

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

852
NO. 77-4182

**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

YESHIVA UNIVERSITY,

Respondent,

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Intervenor.

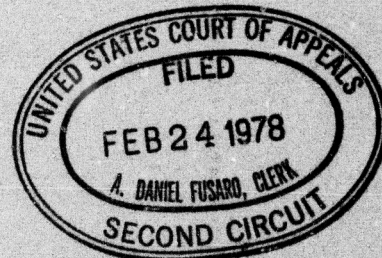
**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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BRIEF FOR
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STATEMENT OF ISSUE PRESENTED

Whether the Board properly found that the University violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the duly certified representative of its employees in an appropriate unit.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, et seq.), for enforcement of its order issued against

Yeshiva University ("the University") on August 24, 1977, and reported at 231 NLRB No. 98 (A. 21-34).^{1/} This Court has jurisdiction of the proceedings, the unfair labor practice having occurred in New York, New York.

I. THE BOARD'S FINDINGS OF FACT

A. BACKGROUND

1. Schools involved

The University is a private institution of higher education chartered by the State of New York with offices and academic facilities located on four campuses in New York City (A. 2; 1495-1496). The three undergraduate schools of the University are Yeshiva College ("Yeshiva"), Stern College for Women ("Stern"), and Teachers Institute for Women ("Teachers") (A. 42-43, 1495). Students enrolled at Yeshiva also participate in a program of Jewish studies in either the Erna Michael College of Hebraic Studies ("Erna Michael"), the James Striar School of General Jewish Studies ("James Striar"), or the Yeshiva Program (A. 483). In total, there are approximately 1200 full-time and 340 part-time undergraduates at the University (A. 42).

^{1/} Record references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The non-medical graduate schools of the University are the Bernard Revel Graduate School ("Revel"), the Wurzweiler School of Social Work ("Wurzweiler"), the Ferkauf Graduate School of Humanities and Social Sciences ("Ferkauf"), and the Belfer Graduate School of Science ("Belfer") (A. 43, 1496). There are approximately 336 full-time and 680 part-time graduate students in these divisions of the University (A. 42).^{2/}

2. University structure

The highest governing body of the University is a self-perpetuating Board of Trustees containing no faculty members (A. 5; 63, 1310, 1498). The University President is the chief academic, administrative and executive officer of the University and is also a member of the Board of Trustees (A. 63, 357, 1498). Assisting the President are University Vice Presidents for Academic Affairs, Business Affairs and Student Affairs (A. 36-37, 63, 184-185). Additional administrative officers include an Assistant to the President, a Registrar, a Bursar, a Director of Admissions, and several University Deans (A. 1519). The Executive Council, whose membership is appointed by the President and consists exclusively of University officers, deals with University-wide policies and procedures, matters that affect the University as a whole or two or more divisions, and such other University matters as the President may assign to it (A. 66-67, 1498, 1519).

^{2/} The University comprises additional schools and affiliates; however, neither the University nor the Union sought to include within the unit the Albert Einstein College of Medicine or the Sue Golding Graduate School of Medical Sciences, and the parties stipulated to exclude from the unit certain theological and community programs as well as Yeshiva High School and a law school which had not opened at the time of the representation proceeding (A. 64, 869-870, 1479). These divisions, accordingly, are not involved in this case.

Two separate academic councils advise the President--the Council of Undergraduate Schools and the Council of Graduate Schools. These bodies, each consisting of student and faculty representatives elected from their constituent divisions, and University officers, are charged with initiation of programs among the various divisions to develop a feeling of University fellowship, achievement of academic excellence, and coordination among the divisions. (A. 67-72, 1498). As former President Samuel Belkin's introduction to the Faculty Handbook indicates, the Graduate and Undergraduate Councils are the vehicles for faculty input into University governance: "you are invited to participate in the determination of policy through the interdivisional councils. Please be advised that your interest and suggestions are always welcome." (A. 1493).

In the fall of 1974, after the filing of the petition in this case, the Council of Graduate Schools and the Council of Undergraduate Schools undertook to meet together as a "committee on academic priorities and resource allocation." This committee comprises the combined faculty, student and management membership of the University's two advisory academic councils, and is chaired by the Vice-President for Business Affairs. (A. 93-94, 188-189.) The committee met twice, but took no action beyond recognizing that if it were to do its work seriously, some "painful" decisions had to be made. (A. 596-597, 589-590).

The University Faculty Review Committee consists of eight full-time tenured faculty members elected for two-year terms by the faculties of Yeshiva, Wurzweiler, Stern, Ferkauf, Erna Michael, Revel, Belfer and the Albert Einstein College of Medicine (A. 320-321, 1525-1527).

The Committee hears faculty petitions concerning promotion, termination of tenure, or other grievances having no economic effect; its authority is limited to making recommendations directly to the Dean of any school or, where appropriate, to the President of the University (A. 1522-1524).

3. The Faculty

Full-time faculty appointments are made by the President, who issues an "appointment letter" (A. 317, 1113, 1138, 1499). Full-time faculty receive a base appointment to a particular school, a joint appointment to more than one school, or, in a few cases, a "University appointment" (A. 484-485, 1499). They receive an annual salary according to pre-set scales, and are paid their full salary even if a course they were scheduled to teach ultimately is not offered (A. 215-217, 339-343, 498, 543). The minimum full-time teaching load generally is twelve "contact hours"—hours spent in classroom teaching or in counselling—or their equivalent (A. 87-88, 312, 375-376, 410-412). Full-time faculty are expected to devote themselves full-time to the service of the University and are required to seek express approval from their Dean and the President before accepting any outside employment (A. 40-41, 352, 616, 879, 1016, 1500, 1520-1521). Full-time faculty members are eligible for promotion, tenure and sabbatical leave; to participate in health and disability insurance plans, in group

life insurance, and in the University Retirement Income Plan; to receive a 50 percent tuition reduction for children and spouses attending the University or its affiliated High School; and to be reimbursed for certain professional travel expenses. (A. 100-104, 501-502, 622, 1501-1508).

Part-time faculty are hired to teach specific courses by the Dean or Director of the division; they do not receive an appointment letter from the President. (A. 335, 788, 804, 910-911, 1142.) Compensation of part-time faculty, individually negotiated by the Dean at the time of hiring, is on a per-course basis; if a course scheduled to be taught by a part-time faculty member is not offered, he will not be paid (A. 399, 371, 478, 499, 610-611, 613, 914-915, 1118, 1203). Part-time faculty are not required to obtain permission from the Dean in order to engage in outside employment (A. 351-352, 517, 880, 1016). They are not eligible for promotion, tenure, or benefits available to full-time faculty members (A. 344, 373-374, 502, 703, 848-849, 911, 1184). Part-time faculty in general are excluded from full voting membership in formal faculty bodies.^{4/}

^{4/} At Stern, for example, only part-time faculty who teach at least three hours and have served at least three years are granted voting status, while part-time faculty at Yeshiva who teach at least three hours may vote only if they have served five or more years (A. 269, 415). The written by-laws at Ferkauf exclude part-time faculty from the definition of "full members," and permit but do not mandate the granting of "associate member" status to certain limited categories of non-full-time faculty upon approval of the Dean (A. 1613-1614).

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4. Structure of the Divisions

Each component school, college or program at the University is given wide latitude to determine its own curriculum, grading system, admissions and matriculation standards, and course schedules (A. 280-294, 297, 299-300, 413, 511, 540). Control of each division's budget, however, is centralized in the University administration (A. 190-217, 1024-1025). Each division is headed by a Dean or Director accountable to the University President (A. 265-266, 413, 575-576, 926).

Faculty members in each division meet formally or informally to discuss and pass resolutions on a wide range of professional and institutional concerns (A. 266-268, 414-418, 541-542, 545-546, 665-666, 810-811). At Stern, Yeshiva, Belfer and Ferkauf, the faculty meets and acts four times each year pursuant to written bylaws and/or a constitution officially approved by the President (A. 268, 489-490, 806-807, 1143-1144). At other divisions the faculty meets when convened by the Dean or Director. Faculty meetings generally are chaired by the Dean or Director of the respective divisions. (A. 415, 546).

Most schools also have faculty and faculty-student committees concerned with subjects ranging from grading practices to faculty welfare (A. 306-308, 421, 428, 438-439). The Faculty Welfare Committees at Yeshiva, Stern, Wurzweiler, Belfer and Ferkauf, in particular, have negotiated with the University administration on behalf of the full-time faculty concerning salary scales and other terms and conditions of employment (A. 208-209, 249a, 340, 363-365, 543, 899, 904-905, 1017, 1018-1020, 1021, 1022-1023, 1236-1239, 1259, 1261-1264, 1312, 1313).

5. Departmental Structure

At Stern, James Striar, Revel, Belfer and Ferkauf, the faculty in each discipline belong to and meet as departments. Teaching faculty members serve as chairmen of these departments. They receive no salary increment or monetary bonus for their service as chairmen; rather, they are paid in the same fashion as teaching faculty members (A. 364, 458, 515, 516, 620-621, 712, 715, 822-823, 845-846, 908, 1108-1111). Yeshiva has no formal departments but rather is divided into four broad academic divisions, each headed by a chairman elected by the faculty. In each academic subject area within a division at Yeshiva, however, the faculty member with the greatest seniority is referred to as a "senior professor" and the Dean often consults with them in administering Yeshiva's affairs. (A. 404-405, 440, 449, 457)

Erna Michael similarly has major subject areas rather than departments, with a senior professor in three of the eight areas (A. 537, 539, 553).

Wurzweiler, Teachers and the Yeshiva Program lack formal departments. For purposes of discussion and self-educataion, Wurzweiler faculty teaching a common subject, or teaching in one of three broad areas of social work practice, meet from time to time in groups known as "sequences" and "concentrations", respectively; the Dean of Wurzweiler designated individual faculty members to act as "conveners" to bring the faculty together initially in these meetings (A. 916-926). Like department chairmen, senior professors, division chairmen and conveners receive no additional compensation for their services and are subject to the same terms and conditions of employment as other faculty members at their schools (A. 458, 514-515, 516, 620-621, 924).

B. The Representation Proceeding

On October 30, 1974, the Union filed a petition for a representation election in a unit of appointed full-time faculty members.^{3/} The University contended that all faculty members of the University are managerial or supervisory personnel, not employees within the meaning of the Act, and therefore are not entitled to invoke the Board's representation proceedings (A. 4; 1462). In the alternative, the University sought a unit consisting of all full-time and "regular part-time" faculty; the University defined regular part-time faculty as those who teach six or more hours in the semester in which the election is held and in each of the preceding six semesters (A. 4; 1466). From this unit the University would exclude, as managerial and/or supervisory personnel, faculty members of the University's committee on academic priorities and

3/ Yeshiva University Faculty Association.

4/ Specifically, the Union sought a unit of all full-time faculty appointed to the University in the title of Professor, Associate Professor, Assistant Professor, or Instructor, with a full-time teaching load or the equivalent, but excluding part-time faculty; lecturers; visiting faculty with employment at the University for fixed one-year period who are faculty members at another academic institution; emeritus faculty not actively engaged in teaching at the University; faculty of the Sue Golding Graduate School of Medical Sciences, the Albert Einstein College of Medicine, the Yeshiva High School, and certain theological programs affiliated with the University; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-university funds; librarians; research associates and research assistants; deans and acting deans; directors; the Registrar; and other University officers. (A. 3).
At the hearing the Union indicated that it did not seek to represent any faculty at Teachers, as the evidence indicated that those professors at Teachers labelled "full-time" by the University do not hold faculty appointments and are, in fact, part-time faculty (A. 5-6; 723, 725, 748, 765-768, 774).

resource allocation, and of the University Faculty Review Committee; department chairmen and their counterparts at the various divisions;^{5/} two assistant deans; and principal investigators of research and training grants. In addition, the University sought to exclude all "terminal faculty"—that is, those who, as of the date of the election, have received notice of termination or non-renewal of appointment; have reached the mandatory retirement age; or have given notice of intention to resign. (A. 4; 1468).

Hearings in Case 2-RC-16662 were conducted on 21 dates from November 26, 1974 to May 6, 1975. On the first day of hearings, the entire record in a prior representation proceeding involving the same parties, Cases 2-RC-16517 and 2-RC-16518, consisting of 9 days of hearings and numerous exhibits, was received in evidence and incorporated in the record of the instant case (A. 261).

On December 5, 1975, following transfer of this case to the Board, the Board issued its decision and direction of election, reported at 221 NLRB 1053. The Board found that the Union was a labor organization within the meaning of the Act; that the University faculty were professional employees within the meaning of the Act, not managerial or supervisory personnel; that faculty

^{5/} In addition to division chairmen, conveners and senior professors, the University challenged the employee status of the chairmen of Wurzweiler's Faculty Field Instruction, Admissions, and Doctoral Committees, respectively.

members of the two University committees in dispute were neither managerial nor supervisory personnel; that department chairmen, their counterparts, and two "assistant deans" were neither managerial nor supervisory personnel; that a unit of full-time faculty was an appropriate unit; that "terminal" faculty members employed as of the date of the election were eligible to vote; and that principal investigators were "supervisors" within the meaning of the Act, as alleged by the University, and therefore excluded from the bargaining unit. The Board directed an election in the unit of full-time faculty found appropriate. (A. 14-15). ^{6/}

6/ The appropriate unit was described as follows (A. 14):

All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the Act.

The Union won the election, held between December 16 and 20, 1976, by a vote of 91 to 50, with six challenged ballots (A. 16). On December 29, 1976, the Regional Director certified the Union as the exclusive bargaining representative of the employees in the unit (A. 17-18).

C. The Unfair Labor Practice Proceeding

Commencing on or about January 7, 1977, and at all relevant times thereafter, the University has refused to bargain collectively with the Union certified as the bargaining representative of its faculty, although the Union had requested and is requesting it to do so.^{7/} (A. 27-28). Upon the Union's unfair labor practice charge, the General Counsel on February 2, 1977, issued a complaint charging the University with violating Section 8(a)(5) and (1) of the Act. The University's answer admitted in part and denied in part the allegations of the complaint, and set forth as affirmative defenses the contentions raised unsuccessfully in the prior representation proceeding; in addition, the University alleged that the Board had erred in excluding regular parttime faculty from the bargaining unit without first conducting a rule-making proceeding pursuant to the Administrative Procedure Act. (A. 22-24).^{8/} The General Counsel filed

^{7/} Although the University in its answer generally denied refusing to bargain upon request, uncontradicted evidence shows that the University, by letter to the Union dated December 27, 1976, expressed its intention to obtain judicial review of the certification and that the Union, by letter dated January 5, 1977, requested the University to bargain, to no avail (A. 25; 19-20).

^{8/} 5 U.S.C., Sec. 551 et seq.

directly with the Board his motion for summary judgment and on April 12, 1977, the Board issued a notice to show cause why summary judgment should not be granted (A. 22). The University opposed summary judgment for the reasons set forth in its answer (A. 23).

II. THE BOARD'S CONCLUSION AND ORDER

On August 24, 1977, the Board granted the General Counsel's motion for summary judgment, finding that the University had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the duly certified representative of its employees in an appropriate unit (A. 23-25).

The Board held that it was not obligated to conduct a rule-making proceeding before authorizing a unit which excluded "regular" part-time faculty members and rejected the University's remaining defenses because they had been fully litigated in the prior representation proceeding (A. 24-25).

The Board ordered the University to cease and desist from the unfair labor practices found and from "in any like or related manner" interfering with its employees' rights under Section 7 of the Act. Affirmatively, the Board's order requires the University to bargain with the Union upon request and to post the usual notices. (A. 30-31).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNIVERSITY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES IN AN APPROPRIATE UNIT

The University has refused to bargain with the Union after it was elected by the unit employees and duly certified by the Board as their exclusive bargaining representative. This refusal violated Section 8(a)(5) and (1) of the Act unless the Board acted improperly in certifying the Union. N.L.R.B. v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940); N.L.R.B. v. A.J. Tower Co., 329 U.S. 324, 330 (1946).

In the underlying representation proceeding, the Board found (A. 5) that the University "faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation," and that a unit of full-time teaching faculty members is an appropriate unit. In defense of its refusal to bargain, the University challenges these factual findings, contending that (1) no bargaining unit properly can be certified because all its faculty members are managerial or supervisory personnel excluded from the coverage of the Act; (2) even if faculty members may be represented, certain committee members, department chairmen and assistant deans are managerial or supervisory personnel; (3) the Board's determination of the appropriate unit was improper; and (4) the Board should not have permitted "terminal" faculty members to vote in the election.

The Board's certification is entitled to acceptance by this Court unless the objecting party meets its burden of establishing that the Board abused the broad discretion vested in it by Congress in representation matters. N.L.R.B. v. A.J. Tower Co., *supra*, 329 U.S. at 324; N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969); N.L.R.B. v. Mercy College, 536 F. 2d 544, 548 (C.A. 2, 1976). As this Court explained in N.L.R.B. v. Olson Bodies, Inc., 420 F. 2d 1187, 1189 (C.A. 2, 1970), cert. denied, 401 U.S. 954 (1971):

The conduct of representation elections is the very archetype of a purely administrative function, with no quasi about it, concerning which courts should not interfere save for the most glaring discrimination or abuse.

In particular, the Board's determination, pursuant to Section 9(b) of the Act, that a particular group of employees constitutes an appropriate unit for bargaining, will not be set aside unless the Board abused its "large measure of informed discretion." Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 491 (1947). See Wheeler-Van Label Company v. N.L.R.B., 408 F. 2d 613, 616-617 (C.A. 2, 1969), cert. denied, 396 U.S. 834; Empire State Sugar Co. v. N.L.R.B., 401 F. 2d 559, 562 (C.A. 2, 1968) (the Board's unit determination will not be reversed in the absence of an arbitrary or capricious exercise of administrative discretion). Similarly, the Board's factual findings as to employee status are entitled to great weight and are not lightly set aside. Stop & Shop Companies, Inc. v. N.L.R.B., 548 F. 2d 17, 18 (C.A. 1, 1977); N.L.R.B. v. Mercy College,

supra, 536 F. 2d at 548; N.L.R.B. v. Stark, 525 F. 2d 422, 431 (C.A. 2, 1975) ("It is settled law that the Board's determination of this question receives even more than usual weight.")

Tested by these principles, as we show below, the Board properly exercised its broad discretion in rejecting each of the University's contentions and certifying the Union.

I. THE BOARD PROPERLY FOUND THE UNIVERSITY
FACULTY TO BE PROFESSIONAL EMPLOYEES, NOT
MANAGERIAL PERSONNEL OR SUPERVISORS

A The University Faculty Members Are
Professional Employees

A "professional employee" is defined in Section 2(12) of the
Act as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

Professional employees are characterized by the consistent exercise of discretion and independent judgment in performing non-routine, often highly specialized work. They typically work without supervision and exercise substantial authority in "matters of importance

to the Employer's financial and other managerial interests." Westinghouse Electric Corporation, 163 NLRB 723, 726 (1967), enf'd, 424 F. 2d 1151 (C.A. 7, 1970), cert. denied, 400 U.S. 831; Puget Sound Power & Light Company, 117 NLRB 1825, 1827 (1957). The work of a professional employee is closely integrated with management functions, affects management policies, may involve some control, coordination or direction of other employees, and generally carries with it attributes which in another context might suggest managerial or supervisory status; nevertheless, Congress expressly chose to grant such employees the full protection and benefits of the Act. As the Board recently explained in General Dynamics Corp., Convair Aerospace Division, 213 NLRB 851, 857-858 (1974):

Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial.

The University faculty members fall squarely within the statutory definition of professional employees. Their work is "predominantly intellectual and varied in character," requiring "knowledge of an

advanced type" acquired in an institution of higher education. Individual faculty members teach their courses without supervision, and have considerable freedom to determine their own course content, syllabi and teaching methods, to formulate and administer examinations, and to evaluate student performance (A. 1066-1067, 1069-1071, 1104-1105). As the Board has noted, "[d]etermination of the details, and indeed, the manner of instruction would appear to be peculiarly within the province of a professional teacher and the absence of this latitude would cast serious, and probably fatal, doubts on his professional status." New York University, 205 NLRB 4, 5 (1973). Meeting together in departments, subject areas, committees or other professional peer groups, faculty members evaluate their own and each other's work, agree upon an overall approach to be followed in teaching, coordinate their coverage of curriculum, recommend adding or deleting courses from the curriculum, and address any other matters relevant to their professional work (A. 278-285, 290-292, 294, 297, 421-422, 428-429, 825-826, 840-841, 845). Meeting a few times each year, the entire full-time faculty of a school may raise, discuss and vote on a wide range of academic and institutional issues, from grading policy to degree requirements (A. 309, 545-546, 559, 580, 586).

In these circumstances, the Board properly found the University's faculty members to be professional employees entitled to vote for collective representation. See N.L.R.B. v. Wentworth Institute, 515 F. 2d 550, 557 (C.A. 1, 1975). Indeed, this Court has noted the "growing trend toward unionization of faculties at the university level."

N.L.R.B. v. Mercy College, supra, 536 F. 2d at 545, n. 1, and cases cited therein. Labor organizations currently administer faculty collective bargaining agreements at over 500 college campuses nationwide, representing an estimated 150,000 faculty members.^{9/} The Board's decision here thus reflects the realities of labor-management relations in the collegiate setting and comports with a widely-shared recognition of the organizational rights of college faculty.

B. The University Faculty Members Are Not Managerial Personnel

The Board has long defined "managerial" employees as "executive employees who formulate, determine and effectuate management policies", Ford Motor Co., 66 NLRB 1317, 1322 (1946), or as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer", Palace Laundry Dry Cleaning, 75 NLRB 320, 323 n. 4 (1947), cited with approval in N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc., 416 U.S. 267, 276, 288 (1974).^{10/}

^{9/} Directory of Bargaining Agents and Contracts, The National Center for the Study of Collective Bargaining in Higher Education, April 1977 (figures updated pending publication of the 1978 Directory using data supplied by the Center).

^{10/} In Textron the Court held that all managerial employees are excluded from the coverage of the Act, and noted that "the Board has had ample experience in defining the term 'managerial' in the manner which we think the Act contemplates," and that the Board's definition has been "approved by courts without exception." 416 U.S. at 288, 290 n. 4. See Continental Insurance Co. v. N.L.R.B., 409 F. 2d 727, 730 (C.A. 2, 1969), cert. denied, 396 U.S. 902; International Ladies' Garment Workers' Union v. N.L.R.B., 339 F. 2d 116, 123 (C.A. 2, 1964). The Court in Textron plainly did not establish any new legal principles for determining "managerial" status; rather, it left to the Board the task of applying its settled standards to individual factual situations.

A managerial employee must act on behalf of management in formulating and effectuating management policies. New York University, 221 NLRB 1148, 1149 (1975) ("only authority and discretion exercised in the interest of management are relevant in this context"); General Dynamics Corporation, supra, 213 NLRB at 857 ("managerial status . . . is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management"). Moreover, the mere power to make effective recommendations contributing to company policy does not render employees managerial where they lack "the discretion and authority to make the ultimate determination, independent of company consideration and approval, of whether a . . . policy should be adopted," or where their authority in major policy matters is circumscribed by the employer's custom or policy. Illinois State Journal-Register, Inc. v. N.L.R.B., 412 F. 2d 37, 42-43 (C.A. 7, 1969). See Eastern Camera and Photo Corp., 140 NLRB 569, 571 (1963), cited with approval in N.L.R.B. v. Bell Aerospace, supra ("even the authority to exercise considerable discretion does not render an employee managerial where his discretion must conform to the employer's established policy").

The Board applies these principles in resolving the status of academic professionals, as here, who influence or, at least, participate in formulating University policies. In Adelphi University,

195 NLRB 639, 648 (1972), for example, the Board rejected the contention that faculty members were managerial personnel, stating:

In this case . . . the ultimate authority does not rest with the peer group but rather with the board of trustees. Thus, although the facts indicate that much respect is paid by the trustees to the recommendations of the collegial body, it is equally clear that the trustees reserve the ultimate authority for themselves. It is also clear that the board of trustees, even if it had such power, has not attempted to convert the committees into managerial or supervisory entities. They are not advised to advocate management's interests in making their decisions, nor are they advised that they are management's representatives in making them.

The Court of Appeals for the First Circuit in N.L.R.B. v. Wentworth Institute, supra, also recognized that college faculty were not excluded by Congress from the coverage of the Act merely because "the trustees, who have ultimate authority, as a matter of course delegate to the faculty or its representatives varying amounts of authority and influence over educational policy and the governance of the institution." 515 F. 2d at 556 (emphasis added). Applying these principles to the facts of this case, as shown below, the Board properly rejected the University's contention because the University faculty members themselves do not formulate, determine and effectuate management policies, and because the faculty at all times acted collectively in their own interest rather than as true representatives of management when participating in University governance (A. 5).

As in Wentworth Institute and New York University, the University Board of Trustees has ultimate authority to formulate, determine and effectuate management policies. The Board alone promulgates and amends the Faculty Handbook, the comprehensive document of management policy governing the employment of full-time faculty members. The President, as the Board of Trustees' delegate, exercises final authority in such personnel decisions as appointments, promotions, salary increases, tenure, sabbatical leave, and grievance adjustment (A. 286-287, 317, 326, 357, 359, 413, 447). Although faculty input is solicited in some of those decisions, the Vice-President for Academic Affairs makes an independent investigation and review of the relevant information to aid the President in reaching his own decision (A. 91-92, 88-89, 99-100). Moreover, faculty input generally takes the form of a collegial recommendation to the Dean of the school involved, who in his own discretion may concur, add his independent recommendation, or suppress the recommendation of the faculty before it reaches higher University officials and the President (A. 286, 388-389, 702-703, 1165, 1168, 1189-1190, 1128-1130). In these areas, therefore, the University faculty members have, at best, a narrowly circumscribed advisory role and are not managerial employees. See International Ladies' Garment Workers' Union v. N.L.R.B., supra, 339 F. 2d at 123 (Union's business agents, organizers and educational directors were not managerial where they responsibly effectuated, but did not ultimately or principally formulate, policy: "the Board is clearly warranted in finding that they

are more concerned with . . . following policy rather than establishing it"); Petail Clerks International Assn. v. N.L.R.B., 366 F. 2d 642, 644-645 (C.A.D.C., 1966), cert. denied, 386 U.S. 1017 (1967).

Furthermore, the faculty's extensive role in determining academic policy further supports the Board's conclusion that they are professional, not managerial employees. As shown above, pp. 16-18, academic decision-making by faculty members acting in their own interest is a customary, essential attribute of their professional status. That faculty members within a school or department cooperate for their mutual benefit in exercising collectively the professional discretion which they possess as individuals does not alter their employee status. The weight and respect accorded the faculty's views in the areas of their expertise is a function of their professional standing, independent of their position in the governing structure of the University. Whatever input the faculty may have in areas of University governance, such as personnel and budget, similarly arises from their professional concern with the academic quality of the institution, and their qualifications to assess the impact of management's policies on their work, or to evaluate the work of their peers. The faculty act in their own behalf, not as true representatives of management, when participating in the formulation of academic and institutional policy. Conferring managerial status upon such professional employees "would eviscerate the traditional distinction between labor and management." General Dynamics Corp., supra, 213 NLRB at 858.

In short, as the Board found here (A. , , "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' . . . and final authority rests with the Board of trustees." Accordingly, the Board properly declined to disenfranchise this entire class of professional employees.

C. The University Faculty Members Are
Not Supervisors

Section 2(11) of the Act defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

By this definition, Congress sought to distinguish "supervisory personnel, traditionally regarded as part of management" from protected "employees"—that is, "the very men they were hired to supervise." The framers of this statutory definition emphasized their intention to exclude from the coverage of the Act only "truly supervisory" personnel vested with "genuine management prerogatives", not those who perform "minor supervisory duties." S. Rep. No. 105, 80th Cong., 1st Sess. 3-4 (1947). Accordingly, as the courts have recognized, although the Act affords an employer the unqualified loyalty of his true supervisors, "the Board has a duty to employees to be alert not to construe supervisory status too

broadly because the employee who is deemed a supervisor is denied employee rights which the Act is designed to protect." Westinghouse Electric Corporation v. N.L.R.B., 424 F. 2d 1151, 1158 (C.A. 7, 1970), cert. denied, 400 U.S. 831.

Consistent with legislative intent and statutory language, the Board and the courts have held that while the catalog of supervisory powers set forth in Section 2(11) is to be read in the disjunctive, in exercising any one of those powers "a 'supervisor' must possess authority and use independent judgment in exercising his supervisory authority on behalf of management." N.L.R.B. v. Wentworth Institute, supra, 515 F. 2d at 557 (emphasis added); International Ladies' Garment Workers' Union v. N.L.R.B., supra, 339 F. 2d at 121 ("only if the individual 'directs' or 'assigns' qua employer, or qua representative of the employer, such as a foreman might do, does the individual 'supervise' within the meaning of section 2(11)"); General Dynamics, supra, 213 NLRB at 858 ("Supervisors are management people . . . While it is true that the authorities contained in Section 2(11) of the Act are indicative of supervisory authority, it does not necessarily follow that the exercise of one or more of those authorities ipso facto confers supervisory authority unless it is exercised in the genuine managerial sense.") Employees who make "recommendations" in their own interests which management routinely follows are not thereby transformed into statutory supervisors. Stop & Shop Companies, Inc. v. N.L.R.B., 548 F. 2d 17, 19 (C.A. 1, 1977).

Furthermore, the occasional, incidental or sporadic performance of some supervisory tasks does not require the exclusion of an employee whose principal duties are of the same character as those of other bargaining unit employees. N.L.R.B. v. Dunkirk Motor Inn, Inc., 524 F. 2d 663, 666 (C.A. 2, 1975); Westinghouse Electric Corporation v. N.L.R.B., *supra*, 424 F. 2d at 1157-1158; N.L.R.B. v. Doctors Hospital of Modesto, 489 F. 2d 772, 776 (C.A. 9, 1973). See Adelphi University, 195 NLRB 639, 644-645 (1972). As noted above, p. 16, the Board's factual determination of employee status is entitled to "even more than usual weight," N.L.R.B. v. Stark, 525 F. 2d 422, 431 (C.A. 2, 1975), and will not be set aside unless the Board abused its "large measure of informed discretion" in evaluating the subtle gradations of actual power distribution within an organization. Stop & Shop Companies, Inc. v. N.L.R.B., *supra*, 548 F. 2d at 20 (C.A. 1, 1977); Westinghouse Electric Corporation, *supra*, 424 F. 2d at 1156 (C.A. 7, 1970); Continental Insurance Company v. N.L.R.B., *supra*, 409 F. 2d at 7 (C.A. 2, 1969); N.L.R.B. v. Metropolitan Life Insurance Co., 405 F. 2d 1169, 1172 (C.A. 2, 1968).

The Board found that the faculty were not statutory supervisors because individual faculty members possessed no authority prescribed by Section 2(11), and because any collective faculty action embracing those prerogatives was exercised solely in the interest of the faculty rather than in the interest of their employer. It is undisputed that faculty members individually lack the power to hire, fire, reward, discipline or direct other faculty or non-faculty employees, or to

perform any of the functions enumerated in Section 2(11). Faculty members collectively neither exercise nor recommended the exercise of any Section 2(11) powers relative to non-faculty employees of the University. A statutory supervisor must supervise someone on behalf of their mutual employer. Here, although the faculty's collegial and professional action included general proposals concerning hiring, promotion, salary, tenure, work assignments and other conditions of employment, it is pure sophistry to suggest that, therefore, all faculty members mutually "supervise" each other and themselves, and should be denied union representation. See General Dynamics, supra, 213 NLRB at 859. Rather, such collegial action by peers concerning their own conditions of employment is inherently action in the interest of the faculty themselves as professional employees—a circumstance peculiar to most institutions of higher learning—not action in the interest of the University qua employer. Accordingly, the Board properly found that the University faculty as a class are not statutory supervisors.

D. Faculty Representatives on the Committee on Academic Priorities and Resource Allocation and on the University Faculty Review Committee are Neither Managerial nor Supervisory Personnel

The University maintains that even if all faculty are not excluded from the coverage of the Act by virtue of their role in University governance, individual faculty representatives on two University committees nonetheless are managerial and/or supervisory personnel. The Board rejected

this contention because the faculty members on each of these committees were elected by the faculty and served as their representatives rather than as true representatives of management; furthermore, the exercise of collective authority based upon discussion and consensus among peers is insufficient to render individual members of such faculty committees statutory supervisors.

As noted above, p. 4, the committee on academic priorities and resource allocation is nothing more than the membership of the University's two advisory academic councils, meeting jointly in response to certain general concerns about the effects of budgetary restrictions on the academic programs of the University. Management is represented on the committee by University officers. The elected faculty delegates, on the other hand, represent the faculty of their schools and advocate their professional interests in discussing the allocation of limited financial resources. By consulting and working with representatives of the academic community the University did not make the faculty delegates—or the student members of those committees—a part of management. Moreover, as noted above, p. 4, the committee took no action and made no recommendations. Indeed, its manner of operation, approach to its subject, powers, goals, and even ability to function as a committee were never more than mere possibilities. As Dean Rabinowitz, a member of the committee, testified (596-597):

I don't know whether anything will come about . . . in this meeting or perhaps even the one after that, but as the committee members begin to get used to the idea that hard decisions have to be recommended, then we will see, I hope, I hope, very great progress from this committee.

Members of the University Faculty Review Committee similarly exercise no authority specified in Section 2(11) and are not true representatives of management. No individual committee member can adjust, or recommend the adjustment of, faculty grievances on behalf of management. As a group the Committee can only advise the Dean of a school or the President, who, in turn, has the ultimate responsibility independently to make the crucial decision. There is no evidence that the Committee had ever made an effective recommendation concerning the adjustment of a grievance or any other matter; on the contrary, the only specific evidence of Committee action involved an ineffective recommendation that a fellow faculty member be reappointed (A. 355-356, 1557-1563). In any event, the power to report on a grievance does not in itself defeat employee status absent proof that the Committee members act "qua employer, or qua representative of their employer." International Ladies' Garment Workers' Union v. N.L.R.B., supra, 339 F. 2d at 121; General Dynamics, supra, 213 NLRB at 858; Adelphi University, supra, 195 NLRB at 648. The record in this case fails to show that the Faculty Review Committee members, elected by their colleagues on a rotating basis for two-year terms, in fact represent the interest of the University administration.

II. THE BOARD ACTED WITHIN ITS DISCRETION
BY INCLUDING DEPARTMENT CHAIRMEN IN THE
FACULTY BARGAINING UNIT

Rejecting the University's contention that department chairmen and persons with similar responsibilities ^{11/} should be excluded from the faculty unit because they are managerial or supervisory employees, the Board found (A. 9) that the authority and "role of the chairmen in faculty personnel decisions such as hiring, firing, and other changes of status . . . has been effectively diffused among the department faculty pursuant to the principle of collegiality" and that in these management areas, chairmen act "primarily as instruments of the faculty . . . from whom they receive their authority," and not in the interest of the University administration. Since, as we show below, department chairmen do not exercise any of the supervisory prerogatives enumerated in Section 2(11) of the Act "in the interest of the employer" (supra, pp. 24-26), but rather are, at most, "first among equals," the Board properly included them in the faculty bargaining unit.

A. Department Chairmen are Full-time Teachers and
are Chosen by the Faculty Which They Represent

Department chairmen are full-time faculty members who teach classes. Their normal full-time teaching load of 12 course hours or their equivalent per semester is, however, often reduced, as is the teaching load of other faculty members who, for example, perform research

11/ Faculty members holding the positions of department chairman, division chairman, senior professor and convener shall be referred to collectively as department chairmen.

or serve on other faculty committees (A. 130-131, 312, 369, 486, 1116-1117). They receive no additional compensation for their services as chairmen and generally are compensated in the same manner, including fringe benefits, as other full-time faculty members (A. 364, 458, 515, 516, 518, 620-621, 715, 845-846, 908, 924, 961, 1109, 1239, 1313). Department chairmen are subject to the same terms and conditions of employment set forth in the Faculty Handbook as their peers.

Belfer, Ferkauf, Revel and James Striar are organized into formal departments and their faculty, acting either by department or as a whole, elect their department chairmen or choose them by consensus (A. 6; 250, 712, 822-823, 1108, 1177, 1235). Yeshiva's faculty is structured into divisions, not subject area departments, and each division elects its own division chairman. In addition, the most senior professor in an academic subject area at Yeshiva and Erna Michael represents the other professors in that area. (A. 404, 440, 449.) These department chairmen are viewed by the Deans as the representatives of their respective faculties and they have been recalled by their colleagues on several occasions (A. 823-224, 894, 1221).

There are no department chairmen at Wurzweiler, Teachers or the Yeshiva Program, where the faculty acts as a body (A. 722, 916). However, the Dean at Wurzweiler authorized certain faculty members to serve without extra pay as conveners of initial faculty sequence and concentration meetings that were designed only for "discussion and self-education" (A. 918-919). These conveners simply ran the meetings once and never exercised any supervisory authority (A. 918). The department chairmen at Stern are recommended by the Dean for appointment by the President but they act on behalf of the faculty (A. 311).

That department chairmen are active and vocal representatives of the faculty, not the University administration, is further demonstrated by their selection by their colleagues to serve alongside other faculty members on various committees. For example, as elected members of Faculty Welfare Committees, department chairmen join their colleagues in advocating faculty interests, negotiating with the Dean and the University administration concerning terms and conditions of faculty employment at their respective schools, including salaries, and presenting grievances on behalf of faculty members (A. 363-364, 1237, 1239, 1313). Several department chairmen and senior professors have been elected by the faculty of their schools to represent them on the University's Undergraduate and Graduate Councils, and to serve at the various schools on faculty committees (A. 362-363, 1518). By contrast, the University's Executive Council and Budget Committees are composed exclusively of University officers and Deans (A. 66-67, 191, 510, 521).

B. Department Chairmen do not Supervise Faculty
on Behalf of the University; Rather, They
Participate with the Faculty in Collegial
Decision-making

Department chairmen have no authority to make faculty appointments; to grant promotions, tenure, or salary increases; to change class assignments; and to discipline faculty members or adjust their grievances. Rather, the faculty--acting "on a collegial basis"--makes recommendations in certain of these areas to the University administration through and with the department chairmen, who "act primarily as instruments

of the faculty in these matters" (A. 9; 251, 1108, 1111, 1330). In short, department chairmen do not exercise supervisory authority over their fellow faculty.

The University's President appoints all full-time teaching personnel upon the recommendation of the respective Deans who, in turn, may consult with the chairmen or faculty (A. 317, 1499). At Ferkauf, for example, faculty members in the department interview candidates and together recommend an individual for appointment. The department chairmen then brings the documentation concerning that individual's qualifications, as well as the faculty's reasons for its recommendation, to a meeting of all department chairmen, at which the Dean solicits their reaction. In most cases, the chairmen concur in the faculty's recommendation, and the Dean transmits it to the President. (A. 1173-1175, 1181-1182). Similarly, at Belfer the entire department searches for new faculty and votes on the candidates; the chairman communicates the department's choice to the Dean for further action (A. 813, 1131). The Dean, however, is expressly authorized to disapprove such recommendations and he has refused to refer them to the President for final action (A. 892-893). In such instances, individual faculty members, including the chairman, may carry their views directly to the President, and, as the Dean testified (A. 821), "the President has to weigh one man against the department or one man against a senior member of the department." At Revel, a department chairman may recommend candidates to the department's faculty, but

they make an independent consensus choice which the chairman transmits to the Dean for action by the President (A. 1108, 1111, 1130, 1131-1132, 1134).

At Stern and Yeshiva, a different hiring procedure exists. The department chairman (Stern) or the senior professor (Yeshiva) transmits the respective faculty's need for additional teaching personnel to the Dean who, if in agreement with the request, interviews applicants alone or with the chairman or senior professor (A. 313-315, 450-453). The senior professor at Yeshiva often is asked to review applications and refer candidates in his field to the Dean (A. 450-451). Although the Deans at those schools solicit, and generally concur in, the professional opinion of the chairman or senior professor concerning the candidate's qualifications, the Deans make their own independent evaluation and submit their own hiring recommendation to the President (A. 314, 317). At Erna Michael, where Hebraic Studies are taught in eight subject areas, the Dean also relies on three senior professors to evaluate the academic qualifications of candidates and to make a recommendation, but only because, as he testified (A. 563-564, 600a), "there is. . . about eight subject areas. I have a good knowledge of two, I think, and passing knowledge of two or three others, and, virtually, I have no knowledge. . . in the other three or four."

At other schools in the University--for example, James Striar--department chairmen have even less input as to hiring decisions. At Striar, the Director has never asked a chairman to investigate the qualifications of candidates; rather, he does all the research and makes a recommendation, sometimes discussing his conclusion with the chairman (A. 694-695). However, the role of the chairman, as the Director testified (A. 695), "is not much" and such discussions last "a half-hour, an hour."

The President makes all tenure decisions upon the Dean's recommendation (A. 99-100, 326). ^{12/} The degree of faculty involvement in that decision varies from school to school. At Ferkauf, for example, department members evaluate candidates for tenure and communicate their written findings through the chairman to the Dean, who convenes a council of all tenured faculty members (A. 1185-1186). A committee of that council rigorously screens the department's evaluations and makes a recommendation to the full council, which votes by secret ballot and transmits its recommendation to the Dean (A. 1187-1188). The Dean can and has refused to follow the council's recommendation (A. 1189-1190). Similarly, at Belfer tenure recommendations are made by the entire department and are referred to the Dean for ultimate decision by the President (A. 838-839). At Stern, the Dean makes his own recommendation but also solicits one from the candidate's department chairman; both recommendations are sent to the President, who makes an independent evaluation and decision (A. 358-359). Department chairmen at other schools in the University play no role in the tenure-granting process (A. 1034).

The President also grants all promotions—indeed, in the few years preceding the Board hearings in this case he froze all promotions regardless of favorable recommendations. The faculty at most of the schools in the University plays a significant collegial role in that decision, however.

^{12/} The Dean's report to the President includes a complete record of the professor's employment history and professional achievements (A. 358-359).

At Stern, for example, an elected faculty Promotions Committee (which includes some department chairmen among its members in their capacity as teachers) solicits recommendations from the candidates' chairmen who, in turn, often consult their departments' faculty (A. 328-329, 358, 362-363). The Committee then submits a recommendation to the administration (A. 330). The faculty at Yeshiva created an advisory council of the four elected division chairmen to make recommendations concerning promotions (and sabbatical leave) to the President (A. 447, 442-443). There, faculty members desiring promotion submit a written request to the council through their division chairman, who, in turn, as the Dean testified (A. 443), "by good democratic procedures, [tries] to convince the other members . . . that they should vote for such a promotion." In some cases, the chairman would not advocate a promotion, but would "simply make the presentation and it would be discussed" (A. 444). In either event, the council's ultimate recommendation is reviewed by the President (A. 444). An aggrieved faculty member may appeal to the University Faculty Review Committee (A. 448). Similarly, an elected faculty Promotions Committee at Ferkauf evaluates recommendations made by the faculty of the respective departments, and sends its own recommendation to the President (A. 1149, 1164-1168, 1170). If, however, the Dean disagrees, the candidate is not promoted (A. 1168). And at Belfer, the entire department considers and recommends promotions, which the chairman communicates

to the Dean, who, in turn, sends a recommendation to the President (A. 895-896). In the case of all promotions at these schools, the Vice-President for Academic affairs makes an independent investigation of the candidate, draws an independent conclusion, and recommends action to the President; the President makes an independent decision and he has overridden the faculty's recommendation. (A. 88-89, 91-92, 896, 1230, 1333-1334).^{13/}

Department chairmen, furthermore, do not assign or allocate teaching responsibilities (A. 440-441, 1126-1127, 1322-1323). Rather, at several schools the faculty meets periodically to review the curriculum, recommend changes and allocate course offerings (A. 280-281, 421-422, 628-630, 632, 553-554, 825, 930). Nor do chairmen discipline faculty members or adjust faculty grievances on behalf of the University. Indeed, department chairmen have presented grievances against the administration on behalf of faculty members (A. 1552-1563). And chairmen possess no authority to recommend salary levels for particular faculty members. Faculty Welfare Committees, which include chairmen among their members, negotiate salaries with the administration for full-time teachers, including those paid to chairmen (A. 208-212, 215-217, 363-364, 1239).^{14/}

^{13/} The senior professors at Erna Michael play no role in promotion decisions, and at Revel and Wurzweiler, the Deans make the promotion recommendations without consulting the chairmen or conveners, respectively (A. 968, 1113-1114). Although a Faculty Promotions Committee at James Striar makes suggestions to the Director, the President relies solely on the Director's recommendation (A. 702).

^{14/} Although one year during the budget freeze some of the department chairmen at Belfer recommended salary increases to the Dean, they were neither effective nor binding because the individual faculty members were entitled to, and did obtain adjustments from the President (A. 830-831, 835-836).

Based on these facts, the Board properly found that the University's department chairmen do not exercise any supervisory authority over other faculty included in the unit. The record demonstrates that within the University's schools faculty decisions generally are made collegially; however, even these collegial "recommendations", which are conveyed by the department chairmen, often are not followed. Moreover, the chairman plainly act not on behalf of the University administration but as representatives of their department faculty. To separate department chairmen from their fellow faculty in these circumstances would eliminate collegial decision-making at the University. ^{15/}

III. THE BOARD ACTED WITHIN ITS DISCRETION BY INCLUDING TWO ASSISTANT DEANS AND CERTAIN COMMITTEE CHAIRMEN IN THE FACULTY BAR-GAINING UNIT

Rejecting the University's contention that they are managerial or supervisory employees, the Board included in the faculty bargaining unit the assistant deans at Belfer and Yeshiva, the chairmen of the admissions and doctoral committees at Wurzweiler, and the field instruction coordinator at Wurzweiler. Since, as the Board found (A. 10) and shown below, these individuals exercise no supervisory

^{15/} The facts demonstrate that department chairmen do not "formulate, determine, and effectuate" the University's policies and decisions but act as faculty members on behalf of the faculty of their departments in performing their duties as chairmen. The University's chairmen are, therefore, not managerial employees. N.L.R.B. v. Bell Aerospace Co., supra, 416 U.S. at 285-289; N.L.R.B. v. Wentworth Institute, supra, 515 F. 2d at 557.

authority over faculty members and others, and are full-time teaching faculty members, they were properly included in the bargaining unit. ^{16/}

Assistant Dean Saul Wischnitzer teaches one biology course each semester at Yeshiva and receives the same compensation and fringe benefits as his fellow full-time faculty members (A. 473). His other principal duty is to assist, counsel and advise pre-med students, and to collect letters of recommendation from faculty members which are sent to medical schools on behalf of the students (A. 472-476). Wischnitzer receives no additional pay but his teaching load is reduced, as is the case for other professors on the faculty (A. 481-483, 517). Once each semester Wischnitzer performs the ministerial task of collecting and collating information from the faculty concerning what courses they have decided to offer, at what time and by whom, so that a course schedule may be printed (A. 473). As the Board found (A. 10), Wischnitzer has not been "delegated the supervisory authority possessed by the dean under whom [he] serve[s]" and has never exercised such prerogatives over the faculty. Plainly, and notwithstanding his title, Wischnitzer is properly included in the faculty bargaining unit.

^{16/} Each individual's duties and functions, not "the specific job title of the employees involved is . . . controlling." N.L.R.B. v. Bell Aerospace Co., supra, 416 U.S. at 290, n. 19.

Assistant Dean Charles Patt is a tenured assistant mathematics professor at Belfer who teaches one course each semester and receives the same compensation as his fellow faculty members (A. 852-853). He was elected by his colleagues to serve on the Belfer Faculty Welfare Committee which negotiates with the University concerning wages and working conditions; to represent them on the University Council of Graduate Schools and its committee on academic priorities and resource allocation; and to be an alternate faculty representative on the committee which studied the possible formation of a University Senate (A. 1310, 1325-1326). ^{17/}

Patt's principal non-teaching responsibility, for which he receives no additional pay but has a reduced teaching load, is to oversee the submission of faculty grant proposals to various funding agencies (A. 856-868). However, he exercises no veto power over those proposals; is not required to sign them; cannot take action when faculty members fail to follow funding agency guidelines in preparing the proposals; and neither holds, administers, nor accounts for any grant funds (A. 859-860). Rather, Patt's routine function is to apprise faculty members of the funding agencies' accounting and budget regulations, so that the proposals are in the correct format, and to see that their expenditures are within those guidelines (A. 3188). None of these tasks permit the exercise of

^{17/} The Dean, however, overrode the faculty's choice and refused to permit Patt to represent Belfer on the study committee because Patt's academic standing as a research professor was less than that of the Dean's choice (A. 1345).

discretion or independent judgment on behalf of the University. Patt also has the additional ministerial chore, like Assistant Dean Wischnitzer, of collecting data on course assignments which the faculty first collegially determined (A. 861). He further routinely allocates classroom space; however, faculty members regularly change or ignore these assignments (A. 1323-1324).

Patt has never exercised any of the Dean's prerogatives, even in his absence, and has never supervised faculty members within the meaning of Section 2(11) of the Act, supra, pp. 24-26. His non-teaching responsibilities are ministerial and routine in nature, and he cannot compel faculty compliance with grant requirements. Patt has, moreover, represented the faculty on numerous committees. On these facts, the Board properly found that Patt is neither a managerial nor supervisory employee, and included him in the faculty bargaining unit.

Dr. Lloyd Setleis teaches a full 12 course hour load at Wurzweiler and is "referred to as," but does not hold the formal title of, chairman of the Doctoral Committee (A. 1030-1031, 960). He coordinates the doctoral program and meets once a month for two hours with other faculty members on the committee (A. 1030-1031). A secretary, not hired by Setleis, works less than 19 hours a week primarily doing work for the committee submitted by Setleis and other committee members (A. 960, 1031). Dr. Setleis supervises no faculty members and whatever "direction" he gives the committee's secretary does not warrant his exclusion from the faculty bargaining unit.

Dr. Esther Lentschner teaches one course less per semester than full-time faculty because of her duties as chairman of Wurzweiler's Admissions Committee. She coordinates the admissions process, looking over applications before notices of interviews are mailed, helping the admissions committee rank the applicants, and attending all committee meetings (A. 3529, 1026-1028). The secretary assigned to that committee works with Dr. Lentschner, but a full-time clerical employee directs, supervises and allocates work among all the secretaries, who are unionized and work under the terms of a collective bargaining agreement (A. 1026, 1029). Since Lentschner supervises no faculty members, there is no basis for excluding her from the unit merely because she works with and incidentally "directs" a nonunit employee.^{18/}

IV. THE BOARD ACTED WITHIN ITS DISCRETION BY
EXCLUDING PART-TIME FACULTY FROM THE UNIT

Rejecting the University's contention that the unit is inappropriate unless it includes all part-time faculty teaching six or more hours in the semester in which the election is held, as well as in each of the six semesters preceding that semester, the Board (A. 4) excluded all part-time faculty because the record shows "a lack of mutuality of interest between the part-time and full-time faculty." The

^{18/} The chairman of the faculty Field Instruction Committee whom the University also would exclude, exercises no managerial or supervisory authority (A. 1037). The Committee's function is to coordinate clinical placement of students with outside agencies, and it makes all its decision collegially subject to approval by the entire faculty (953-956).

Board's present policy is to exclude all part-time faculty "who are not employed in 'tenure track' positions." New York University, supra, 205 NLRB at 6-7.^{19/}

The Board excludes these part-time faculty, as here, because they have "no mutuality of interest" with full-time faculty due to differences in "(1) compensation, (2) participation in University government, (3) eligibility for tenure, and (4) working conditions."

Ibid. In the instant case, part-time faculty generally receive substantially lower compensation, are ineligible for fringe benefits, do not participate to the same extent as full-time faculty in governing the University, cannot achieve tenure and, in effect, have no obligation to the University beyond teaching a few credit hours a semester. Accordingly, as we show below, the Board properly excluded part-time faculty.^{20/} See also University

^{19/} Although the Board initially found appropriate units including both full-time and non-tenure-track part-time faculty (see, for example, C.W. Post Center of Long Island University, 189 NLRB 904, 905-906 (1971); University of New Haven, 190 NLRB 478 (1971)), the Board subsequently experienced difficulties determining which categories of part-time faculty shared a sufficient community of interest with full-time faculty to be included in the unit (see, for example, University of Detroit, 193 NLRB 566 (1971)). Accordingly, the Board granted oral argument and reconsidered its policy in New York University, supra, and Fairleigh Dickinson University, 205 NLRB 673 (1973). See N.L.R.B. v. Wentworth Institute, supra, 515 F.2d at 555 (the Board may reappraise its policy in light of its "cumulative experience").

^{20/} It is, of course, axiomatic that the "Board's duty is to choose an appropriate unit, and it may select among several appropriate ones." Wheeler-Van Label Company v. N.L.R.B., 408 F.2d 613, 617 (C.A. 2, 1969), cert. denied, 396 U.S. 834. Unless the Board abused its "large measure of informed discretion" (Packard Motor Co. v. N.L.R.B., supra, 330 U.S. at 491) in finding appropriate a unit limited to full-time faculty, that determination must stand on review. See Empire State Sugar Co. v. N.L.R.B., 401 F.2d 559, 562 (C.A. 2, 1968); (Continued)

of San Francisco, 207 NLRB 12, 13 (1973); Trustees of Boston University, 228 NLRB No. 120, 96 LRRM 1408 (1977), petition for enforcement pending (C.A. 1, Nos. 77-1143 and 77-1365); Kendall College, 228 No. 126, 95 LRRM 1094 (1977), petition for enforcement pending (C.A. 7, No. 77-1418); N.L.R.B. v. Wentworth Institute, supra, 515 F.2d at 558.

Lack of mutuality of interest in wages, hours and working conditions is a prime determinant for excluding part-time faculty from the full-time faculty bargaining unit, ^{21/} infra, pp. 45-48, but the critical fact that part-time faculty members, no matter how long they remain at the University, can never gain tenure, which is available only to members of the full-time faculty, plainly warrants the conclusion that they share no community of interest with the full-time faculty. New York University, supra. Full-time faculty are granted tenure automatically upon the eighth year of tenure-track service, or earlier upon the collegial recommendation of their colleagues, as adopted by the President (A. 99-100, 326, 1123, 1501-1502).

20/ (Cont'd)

N.L.R.B. v. Horn & Hardart Co., 439 F.2d 674, 682 (C.A. 2, 1971). And the University "faces a most difficult task" establishing--as it must--that the only appropriate unit is one that includes part-time faculty members. Banco Credito y Ahorro Ponceno v. N.L.R.B., 390 F.2d 110, 112 (C.A. 1, 1968), cert. denied, 393 U.S. 832; Wheeler-Van Label Company v. N.L.R.E., supra.

21/ The exclusion of part-time employees from an appropriate industrial or commercial unit has long depended upon these same criteria, which the Board has properly applied, with warranted modifications, to representation issues at institutions of higher education. Continental Baking Company, 99 NLRB 777, 782 (1952); Indianapolis Glove Company v. N.L.R.B., 400 F.2d 363, 367 (C.A. 6, 1968); Cornell University, 183 NLRB 329 (1970).

Tenure is more than mere job security for faculty members; it also involves a continuing financial obligation and an academic commitment on the part of the University to the full-time faculty member. The appointment and reappointment of every full-time, tenure-track faculty member thus has long range implications which figure significantly in University personnel decisions (A. 99-100). For that reason, full-time faculty members alone share fundamental concerns about the criteria for granting such permanent tenure status and generally participate in the decision whether to grant tenure to a particular colleague, supra, p. 35. By contrast, part-time faculty members who are ineligible for tenure, and whose hiring and rehiring over time entail no permanent University obligations, share no community of interest with their full-time counterparts in this unique aspect of the academic community.

The University maintains other institutional distinctions between full-time and part-time faculty with respect to terms and conditions of employment. Full-time faculty are appointed by the President for a minimum term of one year; part-time faculty are hired by the respective Deans, as needed, to teach particular courses for one or two semesters depending upon the duration of the course offered (A. 498, 804, 911, 1015, 1138, 1142, 1200). Full-time faculty receive an annual salary that depends upon their rank of appointment and the University's corresponding pre-set salary scale, and they move up that scale in accordance with University policies (A. 208-217, 341-343, 500-501, 1008). The salary scales, adjustments and increments negotiated by

Faculty Welfare Committees and the University administration (supra, pp. 7, 32, 37) have no application to part-time teachers (A. 363-364, 501, 618-619, 901, 1018, 1023). Rather, part-time faculty are paid on a per-course basis and the amount is negotiated between the Dean and the individual part-timer at the time of each hiring (A. 340-341, 370-371, 478, 850, 912, 1008-1009, 1118). Full-time faculty receive their full annual salary even if one or more of their courses are not offered whereas part-time faculty will be released and not paid if their courses are cancelled (A. 499).

Full-time faculty receive substantially greater compensation than part-time faculty.^{22/} Indeed, a part-time faculty member teaching a hypothetical full-time annual load at Yeshiva, for example, would earn at a maximum slightly less (\$8000) than the minimum full-time salary (\$8900). Such discrepancies are justified according to the Dean of

^{22/} The following table compares the full-time salary range with part-time earnings at the respective schools (A. 502,574, 618-619, 626, 707, 750-751, 850, 1009, 1086-1087, 1252):

<u>School</u>	<u>Full-time</u> (per year)	<u>Part-time</u> (per course)
Yeshiva	\$8900-23,500	\$500-1000/ 3-hour course
Stern	"	"
Erna Michael	"	350-500/ 2-hour course
Belfer	15,000-40,000	1000-2500/ 3-hour course
Ferkauf	11,000 (minimum)	800-1000/ 3-hour course
Wurzweiler	16,000 (minimum)	1000/ 3-hour course (max.)
James Striar	9,000-10,850	1500/ 4-hour course per year
Yeshiva Program Teachers	14,000 (avg.) annual All faculty are part-time, receiving \$17.75 per hour	

Erna Michael, because "a part-timer generally has some other means of employment and . . . may not be as dependent upon the University as a full-timer" (A. 627). In addition, regardless of how many courses part-timers teach, or how many years they serve, only full-time faculty are eligible for such fringe benefits as insurance, pensions, tuition reimbursement, and paid sabbatical leave (A. 373-374, 502, 911, 1506-1508).

Furthermore, even where part-time faculty are eligible, they do not generally participate in University governance to the same extent as full-time faculty members. At many schools membership on various formal faculty committees is limited to full-time or "voting" faculty, and at other schools the participation of part-time faculty is qualified or restricted (A. 354, 887, 1130, 1225-1226. Even at those schools where part-time faculty may participate in, or at least attend, formal and informal faculty meetings, only a few of them, if any, regularly do so (A. 338, 349, 378, 379, 380-381, 415, 494-496, 783, 807, 884, 925, 928, 1015, 1042, 1144, 1200). Indeed, the University administration neither requires nor anticipates such participation for, as the Yeshiva Dean explained (A. 495), "it is a little difficult to expect . . . these people to take off from their jobs to come to the faculty assemblies." (emphasis added.)

Finally, unlike part-time faculty, full-timers must give substantially all of their time to the University. As the Vice President for Academic Affairs explained (A. 40-41):

[T]here are regulations limiting the amount of time that he can give outside of the University. That time . . . is either related to a portion of his faculty teaching load . . . if he is teaching outside the University, it can be no more than half of the normal faculty teaching load, or if he is doing non-teaching work outside the University, it can be no more than the equivalent of a day of such work per week, and the permission to do any work outside the University must be requested from one's dean, who must then request it from the President, and the permission can only be given by the President.

On these facts, the Board properly found that part-time faculty do not share a community of interest with full-time faculty and excluded them from the unit. See N.L.R.B. v. Wentworth Institute, supra, 515 F.2d at 558.

The University, in any event, has failed to establish that the narrow subcategory of part-time faculty it sought to include shares a community of interest with the full-time faculty. The University's artificial grouping, announced belatedly at the final day of the hearings (A. 1466)—that is, part-time faculty teaching six or more hours in each of the six semesters before the election, and teaching the same amount during the semester in which the election is held—corresponds to no functional subcategory recognized by the University. As shown above, the distinctions in employment conditions between part-time and full-time faculty pertain to all part-time faculty members regardless of their teaching load, except, of course, that the more courses a part-timer teaches the more he earns. And at Stern and Yeshiva, for example, the course load and length of service requirements

for part-time faculty participation in the formal faculty bodies do not correspond to the University's definition of "regular" part-time faculty. Indeed, at Ferkauf, Belfer, Wurzweiler, and Erna Michael the University's construct would exclude all part-timers. In short, the University's proposal to include its arbitrarily-defined subcategory of part-time faculty finds no rational basis in the record. ^{23/}

V. THE BOARD ACTED WITHIN ITS DISCRETION
BY PERMITTING FACULTY MEMBERS EMPLOYED
ON THE DATES OF THE ELECTION TO VOTE

The determination of voter eligibility falls within "the wide latitude entrusted to the Board in the conduct of representation elections." N.L.R.B. v. Newton-New Haven Company, 506 F.2d 1035, 1036-1037 (C.A. 2, 1974). The Board's settled practice is to permit a unit employee who is employed on the date of the election to vote despite his expressed intention to quit after the election. Personal Products

^{23/} There is no merit in the University's contention that the Board erred by not holding a rule-making proceeding before finding appropriate a unit of full-time faculty. As the Supreme Court observed in Textron, supra, 416 U.S. at 294, "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." Accord: N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759, 765-766, 772 (concurring opinion)(1969); N.L.R.B. v. Wentworth Institute, supra, 515 F.2d at 556. See also SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). Like the determination of employee versus managerial status in Textron, the Board's unit determination here primarily turns on the facts developed at the hearing and, hence, the Board acted well within its discretion in refusing to proceed by rule making. Indeed, as the Supreme Court observed in Packard Motor Car Co. v. N.L.R.B., supra, 330 U.S. at 491, the "issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision."

Corporation, 114 NLRB 959, 961 (1955); Whiting Corporation, 99 NLRB 117, 122-123 (1952). Indeed, as the Supreme Court stated, "it would be clearly inconsistent with the majority rule principle of the Act to deny a member of the unit at the time of the election a voice in the selection of his bargaining representative." Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 175 (1971).^{24/}

Consistent with these principles, the Board has permitted faculty on "terminal contracts"—that is, faculty members who have been given notice of non-reappointment—to vote in representation elections. See Fordham University, 214 NLRB 971, 975 (1974); New York University, *supra*, 205 NLRB at 9 (1973); Manhattan College, 195 NLRB 65 (1972). In New York University, *supra*, the Board explained (205 NLRB at 9):

faculty may be on terminal contracts for a period as long as a year, during which they may participate fully in all University activities. It cannot be gainsaid that they continue to have a substantial interest in the employment relationship . . . They will be included since, while their employment continues, they have a substantial community of interest with their colleagues.

^{24/} Furthermore, the disenfranchisement of faculty destined to leave the University sometime offer the election—through announced termination, resignation, or retirement—cannot be justified given the well-established principle that the majority status of the elected collective bargaining representative remains unaffected by unit employee turnover for at least one year following certification. Brooks v. N.L.R.B., 348 U.S. 96 (1954); N.L.R.B. v. F. Strauss & Son, Inc., 536 F.2d 60, 64 (C.A. 5, 1976); American Wholesalers, Inc., 222 NLRB 917, enf'd 546 F.2d 574 (C.A. 4, 1976); Nichols-Homeshield Co., 214 NLRB 682, 683 (1974), enf'd, 519 F.2d 1404 (C.A. 7, 1975). In fact, new employees coming into the unit are presumed to support the union in the same ratio as did the unit employees who voted and who were replaced. John S. Swift Company, Inc., 133 NLRB 185, 187 (1961), enf'd 302 F.2d 342 (C.A. 7, 1962); Laystrom Mfg. Co., 151 NLRB 1482, 1484. (1965), enf't denied on other grounds, 359 F.2d 799 (C.A. 7, 1966).

The record in this case similarly demonstrates that faculty who are destined to leave the University after the election because of termination, resignation or retirement share a substantial community of interest with their colleagues in the unit of full-time faculty members, and fully supports the Board's decision to allow them to vote in the election. Those faculty members continue to participate in departmental and other University functions and remain eligible to serve on faculty committees. Faculty who are given notice of non-reappointment at an early date so they may seek employment elsewhere, continue on "terminal status" for almost a year, as in New York University, supra, and during this period they fully participate in University activities (A. 391, 400-401). ^{25/} A full-time faculty member who has given notice of intent to resign is expected to continue his employment through the end of the academic year; in fact, faculty members may and do give notice on or about the first day of a new academic year, retaining thereafter the full responsibilities, benefits and perquisites of their employment (A. 390, 400-401). As in Manhattan College, supra, there is no evidence that during their final academic year of employment such faculty members are not subject to the same

^{25/} Moreover, termination need not conclusively follow from notice of non-reappointment, as a full-time faculty member may appeal his termination through the Faculty Review Committee, the Faculty Welfare Committee, or even directly to the Vice-President for Academic Affairs (A. 393-394). At least two faculty members were engaged in the appeal process at the time of the hearings in this case (A. 394-397).

employment policies as other full-time faculty members. Finally, the record indicates that upon reaching retirement age 65, full-time faculty members may nonetheless continue in University employment with the permission of the President. There is no indication that such individuals do not participate in University affairs to the same extent as, and subject to the same employment conditions as, their colleagues. On the above evidence, the Board properly allowed these faculty members a voice in the selection of their collective bargaining representative.

CONCLUSION

For the reasons stated, we respectfully request that the Court enter an order enforcing the Board's order in full.

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February, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, :
Petitioner, :
v. : No. 77-4182
YESHIVA UNIVERSITY, :
Respondent, :
and :
YESHIVA UNIVERSITY FACULTY :
ASSOCIATION, :
Intervenor. :

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Board's motion for leave to file its brief and joint appendix in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.
this 8th day of February, 1978.


Elliott Moore
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UNITED STATES COURT OF APPEALS

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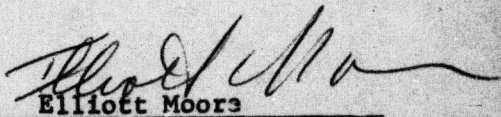
CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 8th day of February, 1978.